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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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In Re: TRAIN DERAILMENT NEAR

TYRONE, OKLAHOMA,

ON APRIL 21, 2005

: 08 MD 1936(BSJ)(DF)
:
: **PLAINTIFFS' RESPONSE AND**
: **OPPOSITION TO THE**
: **MOTION OF DEFENDANTS**
: **KL AND KAM FOR**
: **RECONSIDERATION**

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Plaintiffs represented by Hill Rivkins & Hayden LLP, McDermott & Radzik LLP, Nicoletti, Hornig & Sweeney, and David L. Mazaroli (hereinafter collectively "Cargo Plaintiffs") respectfully respond as follows to the motion for reconsideration filed by defendants Kawasaki Kisen Kaisha, Ltd. ("KL") and "K" Line America, Inc. ("KAM").¹

POINT I

THE MOTION FOR RECONSIDERATION SHOULD BE DENIED

The Order dated June 4, 2008 ("the Order") concerns a nondispositive discovery matter under 28 U.S.C. § 636(b)(1)(A) where "a judge may designate a magistrate to hear and determine any pretrial matter pending before the court." *See Thomas E. Hoar,*

¹ The Cargo Plaintiffs' actions bear S.D.N.Y. Docket Nos. 06 Civ. 00615, 02557, 02956, 02962, 03038, 03040, 03042, and 05159(BSJ)(DF)

Inc. v. Sara Lee Corp., 900 F.2d 522, 525 (2 Cir. 1990) (noting that a magistrate judge's orders regarding discovery issues are reviewed under the "'clearly erroneous or contrary to law' standard" (quoting 28 U.S.C. §636(b)(1)(A))). The self-styled motion for reconsideration filed by KL and KAM is procedurally deficient as it does not address a court order determining a motion or a court order resulting in a judgment as required by Local Civil Rule 6.3. The only avenue available to KL and KAM was to file, within ten days of the entry of the Order, an objection pursuant to Fed. R. Civ. P. 72(a) for consideration by the Honorable Barbara S. Jones under a clearly erroneous or contrary to law standard of review.

In any event the motion is meritless as KL and KAM have pointed to no matters or controlling decisions which were overlooked by the Court. The Order was issued after the Honorable Debra Freeman gave full and careful consideration to all aspects of the scheduling issues before the Court. In particular the following factors were taken into account:

- KL and KAM could have served deposition and document production subpoenas on Plano and CMT for purposes of the New York action at any time after the June 13, 2007 decision by Judge Jones dismissing the third-party complaints. No such subpoenas were served by KL and KAM.
- KL and KAM could have moved for a stay of discovery in the New York litigation when the multidistrict litigation application was made. No motion for a stay of discovery was filed by KL and KAM.
- Cargo Plaintiffs and other parties made expert disclosure decisions based on the status of the evidentiary record at the close of fact discovery and expert reports

are now in the process of finalization. Turning back the clock on fact discovery would have opened a Pandora's box of procedural complications thereby further delaying the trial of the cargo actions.

- The consolidated litigation has been pending for two and a half years, an unprecedented length of time for claims for cargo damage caused by a derailment.

Conclusion

The June 4, 2008 Order is not clearly erroneous and is not contrary to law. Accordingly it should stand as entered. Cargo Plaintiffs respectfully request that the motion for reconsideration filed by KL and KAM be denied in its entirety.

Dated: New York, New York
June 24, 2008

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s/David L. Mazaroli

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